

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
IN RE: : 09-16161 (SMB)
:
KEVIN C. DAVIS, : One Bowling Green
: New York, New York
Debtor, :
-----X
BABITT, : 11-01563 (SMB)
:
Plaintiff, :
:
-against- :
:
GRAHAM, et al., : May 1, 2012
:
Defendants. :
-----X

TRANSCRIPT OF PRETRIAL CONFERENCE;
DEFENDANTS GRAHAM AND VULCAN CAPITAL CORP'S MOTION
TO DISMISS ADVERSARY PROCEEDING
BEFORE THE HONORABLE STUART M. BERNSTEIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Trustee: JONATHAN BODNER, ESQ.
Neiger LLP
151 West 46th Street, 4th Floor
New York, New York 10036

For Defendants: MELISSA A. PEÑA, ESQ.
Norris, McLaughlin & Marcus P.A.
875 Third Avenue, 8th Floor
New York, New York 10022

LEO L. ESSES, ESQ.
Cohen, Tauber, Spievack & Wagner
420 Lexington Avenue, Suite 2400
New York, New York 10170

Court Transcriber: SHARI RIEMER
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 (Proceedings began at 11:22 a.m.)

2 THE COURT: Kevin Davis.

3 MR. BODNER: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. BODNER: Jonathan Bodner, Neiger LLP, appearing
6 this morning for the Trustee.

7 THE COURT: Thank you.

8 MS. PEÑA: Good morning, Your Honor. Melissa Peña
9 from the law firm Norris, McLaughlin & Marcus on behalf of
10 defendants Ford Graham and Vulcan Capital Corp.

11 THE COURT: I guess it's still morning. Good
12 morning.

13 MR. ESSES: Good morning, Your Honor. Leo Esses of
14 Cohen, Tauber, Spievack & Wagner on behalf of defendants
15 Katherine Graham and Nassau Properties and the Ford Graham
16 Family Trust.

17 THE COURT: Thank you. I'm sorry, I didn't mean to
18 cut you off, Mr. Bodner. Why don't you give your appearance?

19 MR. BODNER: Yes, Your Honor. This is the
20 defendant's motion to dismiss the --

21 THE COURT: No, no, just give your appearance and
22 I'll hear the defendant.

23 MR. BODNER: Jonathan Bodner --

24 THE COURT: Unless you want to argue their motion.

25 MR. BODNER: -- for the Trustee. No thank you.

1 THE COURT: Thank you.

2 MR. NEIGER: Edward Neiger, Neiger LLP on behalf of
3 the Trustee.

4 THE COURT: Thank you. Go ahead, Ms. Peña.

5 MS. PEÑA: Your Honor, this is defendant's motion to
6 dismiss all counts in the amended complaint against Ford
7 Graham and Vulcan Capital Corp. pursuant to Federal Rules of
8 Civil Procedure 8(a), 9(b), 12(b)(6) and 17(a).

9 As Your Honor may recall, we initially filed our
10 motion to dismiss in January of 2012. At the time there were
11 approximately 26 counts of the amended complaint against the
12 defendant. In late March of 2012 the Trustee filed an
13 opposition to our motion and they've agreed to voluntarily
14 dismiss with prejudice approximately 15 counts of the
15 complaint against the defendant.

16 THE COURT: I suppose you made some progress.

17 MS. PEÑA: I guess, Your Honor. We provided Your
18 Honor with charts outlining which counts remain and which
19 counts have been dismissed. We're somewhat prejudice in
20 responding to their opposition in the sense that they've never
21 filed a proposed amended, second amended complaint setting
22 forth which factual allegations may be removed as a result of
23 the dismissal of the claims. That means that considering all
24 the factual allegations it's our position that they're
25 insufficient to state a cause of action against the

1 defendants.

2 The crux of the complaint stems from three entities
3 that were jointly owned by defendant Ford Graham and the
4 debtor Kevin Davis and those entities are Vulcan Capital LLC,
5 Vulcan Holdings Ltd. and Vulcan Capital Management, Inc. As
6 we set forth in our papers, we believe that the Trustee left
7 standing to pursue these claims on behalf of the Kevin Davis
8 estate in its individual capacity. A review of the complaint
9 seems to -- the conclusory allegations set forth therein seems
10 to state that the defendant Ford Graham and Vulcan Capital
11 Corp. caused harm to these three Vulcan entities either by
12 fraudulent re-transferring their property or usurping their
13 corporate opportunities.

14 THE COURT: It drops another generation also, doesn't
15 it? There are subsidiaries of these entities that are
16 involved.

17 MS. PEÑA: That's correct, Your Honor. So it's our
18 position that the harm has actually occurred to three Vulcan
19 entities and not to the debtor individually and that the
20 claims should be pursued in the derivative capacity.

21 In opposition to that position the Trustee has said
22 that demand on Ford Graham would have been futile and that --

23 THE COURT: Do you think it would have been?

24 MS. PEÑA: I agree, Your Honor, but on the same -- in
25 the same degree that haven't alleged that in the complaint.

1 They haven't complied with Federal Rule of Bankruptcy
2 Procedure 23.

3 THE COURT: So I can give them leave to amend that;
4 right? That's an easy one to cure.

5 MS. PEÑA: Correct. And I think the harder one to
6 cure is the bulk of the rest of our arguments that we set
7 forth.

8 First, with respect to the remaining counts, the
9 first three counts allege that Ford Graham breached its
10 fiduciary duty with respect to Vulcan Capital LLC, Vulcan
11 Holdings, Vulcan Capital Management, Inc. It's our position
12 that with respect to Vulcan Capital LLC and Vulcan Management
13 that Ford Graham didn't owe a fiduciary duty because it's
14 barred by the actual governing agreement.

15 THE COURT: Well, but isn't -- look, putting aside
16 whether it says it the graverman of what they're contending is
17 that he engaged in self dealing.

18 MS. PEÑA: Correct.

19 THE COURT: And that's not protected under either
20 Delaware corporation law or any of the agreements you've shown
21 me. I haven't seen one for Vulcan Holdings but the other two
22 you've shown me obviously have a carve out as Delaware law
23 does.

24 MS. PEÑA: Right. I mean arguably that could be
25 their position but unfortunately because of the allegations in

1 the complaint we just don't think they've pled sufficient
2 information to meet even the liberal pleading standard in Rule
3 8(a).

4 THE COURT: Well, for example, let's take the
5 adjoining lot allegations.

6 MS. PEÑA: Okay.

7 THE COURT: As I understand it the substance is
8 Graham, Ford Graham borrows money from Vulcan Capital LLC.
9 Purportedly to buy the adjoining lot it turns out that
10 Katherine Graham or somebody else ultimately gets the lot.
11 That doesn't sound so bad but then there's an allegation that
12 thereafter Vulcan Capital LLC essentially paid the expenses on
13 the adjoining lot. Why wouldn't that be self dealing?

14 MS. PEÑA: Well, it's our position that would be
15 first breach of the actual promissory note or a fraudulent
16 conveyance claim that Vulcan Capital LLC would hold.

17 THE COURT: Wait a minute. If Vulcan Capital is
18 paying the mortgage on the adjoining lots owned ultimately by
19 I guess the Ford Graham Family Trust, what does that have to
20 do with the promissory note?

21 MS. PEÑA: Well, it's our allegation that they
22 breached the prom -- that Ford Graham breached a promissory
23 note by fail -- basically Vulcan Capital entered into a
24 promissory note, loaned Ford Graham money, and that he failed
25 to repay those monies.

1 THE COURT: That's not breach of fiduciary duty.
2 That's a contract claim.

3 MS. PEÑA: Right.

4 THE COURT: That's a contract claim that belongs to
5 Vulcan Capital LLC anyway.

6 MS. PEÑA: Right.

7 THE COURT: But just on the allegation -- I forget
8 where it is. It's in 22 -- well, the adjoining line
9 allegations 46 to 54. If you just look at Paragraph 52 it's a
10 little indefinite because he says Ford Graham diverted funds
11 from the Vulcan family and I don't know what that means.

12 MS. PEÑA: I mean that's part of the problem with
13 this complaint.

14 THE COURT: Okay. But let's assume it said Vulcan
15 Holdings or something like that. Putting aside the standing
16 argument, why isn't that sufficiently alleged that Graham
17 breached his fiduciary duty and self dealt and it says he
18 diverted monies from Vulcan Holdings let's say in order to pay
19 the debt on a property he owns.

20 MS. PEÑA: Well, I think, Your Honor, that -- it's
21 not really just a standing argument. If he's trying to allege
22 that our client actually breached a fiduciary to Vulcan
23 Capital it's not sufficient for him to say that he took monies
24 from Vulcan Family which he defines to be --

25 THE COURT: I agree with you.

1 MS. PEÑA: -- multiple entities.

2 THE COURT: I agree. I agree with you that the -- by
3 and large the complaint is too indefinite and it's a problem
4 with -- it's a form of group pleading is what it is.

5 MS. PEÑA: Right.

6 THE COURT: But assuming you could identify the
7 entities --

8 MS. PEÑA: You're correct, Your Honor.

9 THE COURT: Okay.

10 MS. PEÑA: And I think that you brought up a good
11 example because it was dealing with Vulcan Capital LLC but if
12 you take a look at the breach of fiduciary duty claims with
13 respect to Vulcan Holdings Ltd. and Vulcan Management, Inc.,
14 there's not a single allegation in the amended complaint that
15 really addresses a specific transaction involving those
16 entities.

17 THE COURT: Okay. Vulcan Holdings entities are
18 involved in that theft of corporate opportunity theory.

19 MS. PEÑA: Right. With respect to -- but even a
20 theft corporate opportunity all that they allege is that
21 there's this entity known as IF&DC and that they've usurped
22 the corporate entities of one of Vulcan Holding's
23 subsidiaries. They say that they have some type of contract
24 with the government of Bangladesh. We don't know what the
25 contract is about. We don't know when it was entered into.

1 We don't know if Vulcan Capital Holdings is even in a position
2 to take on that contract because they don't describe it. And
3 that's with respect to Vulcan Capital Holdings and that's the
4 only transaction they identify as to Vulcan Capital Holdings.

5 With respect to Vulcan Capital Management, there's
6 not a single transaction that refers to that specific entity
7 in the amended complaint. Your Honor touched upon the
8 transactions as to Vulcan Capital LLC with respect to the
9 adjoining lot. They further allege that one of Vulcan
10 Capital's subsidiaries, Vulcan paid money to Ford Graham.
11 There's no allegation what those monies were for, whether it
12 was unlawful. They acknowledge that Mr. Graham has been
13 involved in all of these entities. So there's no real claim
14 there that those monies weren't for a legitimate purpose.

15 And that's just with respect to the breach of
16 fiduciary duty claim. The remaining counts in the complaint
17 are Counts 22 and 23 and 24 which allege fraud, equitable
18 fraud and unjust enrichment. In their opposition they say
19 that these counts still remain against the defendant Vulcan
20 Capital Corp. but also they don't argue in their papers why
21 they have legitimate claims against Vulcan Capital Corp. So
22 it's unclear to me whether they're still pursuing those claims
23 as against that entity.

24 There's not a single allegation in the complaint
25 regarding fraud being perpetrated by Vulcan Capital Corp. nor

1 is there a single claim as to unjust enrichment.

2 With respect to Ford Graham, we don't believe that
3 they meet the heightened pleading requirement. At a minimum
4 they have to set forth the material misrepresentation or
5 something he failed to disclose. They don't do that in any
6 instance. They don't set forth that Kevin Davis relied on a
7 material representation. They say that they should be --

8 THE COURT: Well, Kevin Davis' reliance would be
9 immaterial anyway. It's not Kevin Davis who is was defrauded.

10 MS. PEÑA: Right. You're correct, Your Honor. It's
11 a little bit confusing because of the way the claims are pled.

12 They attempt to circumvent the 9(b) standard by
13 saying that they should be given time to proceed with
14 discovery. Meanwhile their counsel submits a declaration
15 saying that they've had Eisner reviewing documents, doing
16 forensic accounting work. They've received a lot of documents
17 through informal discovery prior to filing the complaint and
18 we feel that they fare no better under the unjust enrichment
19 claim. As a matter of law, an unjust enrichment claim cannot
20 survive if there is a governing contract. Their actual
21 complaint says that there are their governing agreements that
22 dictate the responsibilities of Ford Graham as to the three
23 Vulcan entities.

24 THE COURT: Okay.

25 MS. PEÑA: Lastly, they seek leave to file a second

1 amended complaint. It's our position -- Your Honor
2 characterized this as them making progress. It's our position
3 that this request should be denied because they filed their
4 original complaint and they sought the dissolution of the
5 three Vulcan entities. The defendants filed a motion to
6 dismiss on various grounds including the fact that they were
7 asserting fraudulent conveyance claims for property that did
8 not belong to the debtor's estate including the whole
9 derivative standing issue.

10 We appeared before the Court on a status conference.
11 Your Honor questioned whether it had jurisdiction to dissolve
12 the three entities. So they file an amended complaint. They
13 take out all the claims with respect to dissolution. They
14 have our motion to dismiss in hand. They could easily cure
15 the deficiencies with respect to the fraudulent conveyance
16 claims, with respect to derivative standing. They could have
17 pled that demand on Mr. Graham would be futile. They don't do
18 that. They file a similar amended complaint. We're forced to
19 move to dismiss and then in opposition they say oh, we just
20 realized that we're seeking to -- we're seeking to avoid
21 fraudulent conveyances that don't belong to the debtor's
22 estate.

23 Our original motion to dismiss was on file since
24 June of 2011. So we don't believe that they should be have an
25 opportunity to amend. If Your Honor is inclined to consider

1 their application we submit that they should be required to
2 file a proposed second amended complaint so that we can
3 determine whether the proposed amendments would be futile and
4 be given an opportunity to brief that.

5 THE COURT: Thank you.

6 MR. BODNER: Thank you, Melissa, and thank you, Your
7 Honor.

8 Before I address the individual legal arguments, I
9 want to speak for a minute about how we got here. The motion
10 to dismiss was filed in June. However, there was settlement
11 in principle. There was even a motion submitted to Your Honor
12 which for no reason of the Trustee did not go through. So
13 months and months later after the Trustee --

14 THE COURT: Why did I deny the motion?

15 MR. BODNER: Your Honor asked for additional facts
16 and then in our process of putting together additional facts
17 it fell apart on the other end.

18 THE COURT: Okay.

19 MR. BODNER: But a significant [inaudible] time has
20 occurred because of that and the Trustee has been trying to
21 facilitate settlement. And one other fact I want as an
22 overarching premise that's going on here, Ford Graham is in
23 control and operating the entire Vulcan family.

24 THE COURT: What does that have to do with the Davis
25 bankruptcy case? This is an individual Chapter 7.

1 MR. BODNER: Yes, Your Honor, because Kevin Davis is
2 a 50 percent shareholder or member in the managing companies
3 as well as the subsidiaries.

4 THE COURT: But so what?

5 MR. BODNER: The operating agreements -- the
6 documents provided show that distributions, profits, voting --

7 THE COURT: But you have not alleged a direct claim
8 against Ford -- I'm sorry, against Mr. Graham under the
9 operating agreements. There's no breach of contract claim
10 here. That would be a direct claim, I understand that, but
11 you're not alleging that.

12 MR. BODNER: Your Honor, Ford Graham owed direct
13 individual fiduciary duties to Kevin as the other 50-50
14 managing member.

15 THE COURT: But when I read your complaint it sounded
16 to me like you were saying Graham stole money and he didn't
17 cut Davis in for 50 percent of what he stole. I don't think
18 that's a claim.

19 MR. BODNER: Yes, Your Honor. But that goes to
20 support breach of fiduciary duties that members owe other
21 members under Delaware law as well as under the operating
22 agreements.

23 THE COURT: I know but the fact that somebody owes a
24 breach of fiduciary duty doesn't give the victim a direct
25 claim. All of these entities are insolvent in both Davis --

1 according to the pleadings are insolvent and both Davis and
2 Graham owe fiduciary duties to the entire community of
3 interest including the creditors, the estate, the other
4 members if it was an LLC but that doesn't give them a direct
5 claim for breach of fiduciary duty. Under Delaware law -- at
6 most he might have a derivative claim.

7 MR. BODNER: Your Honor, respectfully, the Trustee
8 submits that in analyzing whether claims are individual or
9 derivative you look at who was harmed and who would benefit
10 from the recovery.

11 THE COURT: And who was harmed -- when Graham --
12 according to your complaint -- you didn't say it but stole
13 money from Vulcan -- what is it, Elditon?

14 MR. BODNER: Elditon.

15 THE COURT: Elditon, who other than Vulcan Elditon
16 was injured directly?

17 MR. BODNER: Vulcan Capital LLC.

18 THE COURT: No, it wasn't. It wasn't. It was
19 injured to the same extent and in proportion to its interests
20 in Vulcan Elditon that all of the creditors of Vulcan Elditon
21 were injured. That's a difference between a direct and
22 derivative claim. Everybody was injured the same. All the
23 shareholders, all the members, all the creditors were injured
24 the same.

25 MR. BODNER: But, Your Honor, those are not the only

1 claims in the complaint and analyzing the nature of the harms.
2 We look at the operating agreements.

3 THE COURT: You haven't alleged a claim under the
4 operating agreements. So let's move off that. If you have a
5 breach of contract claim that Mr. Graham breached his contract
6 to Mr. Davis I would agree with you that's a direct claim but
7 you have not alleged that.

8 MR. BODNER: Your Honor --

9 THE COURT: Because I don't see a breach here.

10 MR. BODNER: The allegation is that Mr. Davis
11 suffered harms by virtue of his membership interest.

12 THE COURT: All of the creditors suffered harm by
13 virtue of what Graham did if you're right that Graham did bad
14 things. But that is the essence of the direct claim of the
15 entity whose property he stole.

16 MR. BODNER: Your Honor, respectfully, those aren't
17 the only claims in the complaint.

18 THE COURT: I know they aren't the only claims in the
19 complaint. What --

20 MR. BODNER: There's also voting, being pushed out
21 and not receiving --

22 THE COURT: You don't explain that.

23 MR. BODNER: Your Honor --

24 THE COURT: You have conclusory allegations. You put
25 in an allegation that he ran a three part Monte corporation.

1 That's a conclusory allegation. It's not entitled to any
2 weight on a motion to dismiss.

3 MR. BODNER: Your Honor, we tried to substantiate
4 that as best as we could by putting in -- to show that the
5 Vulcan entities -- it's a matter of switching one word around
6 or not. Vulcan Capital Corp., Vulcan Capital LLC.

7 THE COURT: What does that have to do with Davis? It
8 seems to me that Davis is either a member or a shareholder.
9 He's equity.

10 MR. BODNER: Yes.

11 THE COURT: And he only has a right to distribution
12 if the entities are solvent.

13 MR. BODNER: Yes, Your Honor.

14 THE COURT: You allege that the entities were all
15 insolvent at relevant times. You don't allege that they would
16 have been solvent but for the transfers of their property by
17 Graham. I'm not suggesting that gives you a direct claim but
18 you don't even allege that. So what is it that Graham did
19 that harmed Davis' financial interest?

20 MR. BODNER: Well, I guess that's it. It was the
21 years of taking of these types of transactions, the real
22 estate transactions, the Bangladesh transaction, the half
23 dozen Vulcan --

24 THE COURT: What was the Bangladesh transaction?

25 MR. BODNER: There was a contract with the government

1 of Bangladesh which --

2 THE COURT: What was the nature of the contract?

3 MR. BODNER: The nature of the contract was an energy
4 contract with the government to do some sort of energy project
5 and instead of using the entity which -- the allegation is
6 instead of using the entity which Mr. Graham was a 50 percent
7 owner with Kevin Davis he used another entity with a very,
8 very similar name to usurp the opportunity.

9 THE COURT: And usurp the opportunity is a conclusory
10 statement. You haven't given me in the complaint any of these
11 underlying facts about what this is about.

12 MR. BODNER: Well, we acknowledge that some
13 transactions we have more details, date, time, place, amounts
14 and others we have less.

15 THE COURT: Let me ask you a different question.
16 Let's assume that you could just replead these as derivative
17 claims and solve the 23.1 issue. What would the purpose be?
18 First of all, would this Court have jurisdiction over claims
19 brought on behalf of creditors of a non debtor entity
20 essentially or a non debtor estate against a non debtor? What
21 would my jurisdiction be over that? The Trustee wouldn't be
22 suing in his capacity as representative of the estate in that
23 situation.

24 MR. BODNER: I think that's right, Your Honor. I'm
25 not sure. We believe that these are actual claims of Davis

1 and --

2 THE COURT: That I disagree with you. Unless you can
3 show me a direct claim these are clearly derivative claims.

4 MR. BODNER: But, Your Honor, Davis had individual
5 rights in these entities.

6 THE COURT: If you recover a judgment let's say for
7 the diversions you have identified respecting Vulcan Elditon,
8 because that's the most specific of the allegations, where
9 would the proceeds of that recovery go?

10 MR. BODNER: To Davis' estate.

11 THE COURT: What about all the creditors of this
12 insolvent entity? You said that the entity is insolvent.

13 MR. BODNER: Well, the entity is -- these are 50-50
14 entities.

15 THE COURT: But they have creditors. Otherwise they
16 wouldn't be insolvent.

17 MR. BODNER: We don't know the creditor body of that
18 specific Vulcan entity.

19 THE COURT: That's precisely the problem with you
20 representing. Don't you have an intolerable conflict as a
21 representative of the shareholder's estate of recovering money
22 on behalf of an insolvent entity and then paying it to the
23 shareholder or the member?

24 MR. BODNER: Well, also another issue as to the
25 solvency was at the time these actions were filed there were

1 the claims of Plains Capital Bank against the individuals and
2 the guarantees in some of the entities. Those claims and
3 issues as to the solvency at this stage in the case as we have
4 resolved the issues with Plains may actually impact the
5 solvency --

6 THE COURT: But the issue is the solvency at the time
7 of the transfer, not today post settlements.

8 MR. BODNER: That's correct. I'll address two other
9 points.

10 THE COURT: Go ahead.

11 MR. BODNER: On the fraud --

12 THE COURT: What's the material misrepresentation
13 that was made? Where is it set forth in the complaint?

14 MR. BODNER: The concept is if Ford Graham was using
15 shell entities to set up other entities and to divert
16 opportunities there was a scheme of misrepresentation.

17 THE COURT: What's the misrepresentation? You have
18 to identify -- under Rule 9(b) you have to identify the
19 misrepresentation.

20 MR. BODNER: Well, we identi --

21 THE COURT: It sounds to me like you're saying he
22 fooled other parties, not Davis.

23 MR. BODNER: Possibly. But, Your Honor, we identify
24 trusts. We identify the Nassau entities.

25 THE COURT: What is the misrepresentation? It's a

1 fraud case. What's the misrepresentation?

2 MR. BODNER: I understand Your Honor's point. Thank
3 you, Your Honor.

4 On unjust enrichment I would just like to say --
5 they say that because there's some governing agreements there
6 can't be a claim in equity because you have remedies of law.
7 A review of the --

8 THE COURT: Isn't that the law? If the party's
9 relationship is governed by an agreement there's no unjust
10 enrichment claim.

11 MR. BODNER: Absolutely, Your Honor. I have two
12 points to that. One is the actual agreements that we have,
13 some that were submitted to Your Honor with these pleadings,
14 don't provide a remedy for some of the issues of the
15 distributions, the not receiving anything but the capital
16 contribution.

17 THE COURT: But the only claim -- at bottom the only
18 claim that Davis has against Graham is that he didn't get --
19 Graham took the money that he was entitled to as a
20 distribution under the governing agreement.

21 MR. BODNER: That's the main one, yes.

22 THE COURT: But you haven't alleged that in the
23 complaint.

24 MR. BODNER: Then that would bring us to the final
25 point on seeking leave to amend. The Trustee's position is

1 amendment is liberally granted.

2 THE COURT: But you've amended twice or you've
3 amended once.

4 MR. BODNER: It's been amended once and while Ford
5 Graham is using as a sword the dismissal of those 15 or so --

6 THE COURT: I pay no attention to that.

7 MR. BODNER: All right. So I would just say in terms
8 of time a big portion of the time that's gone by has been
9 substantial efforts by the Trustee to try to amend -- excuse
10 me, to settle. Also, Ford does have the companies. He's
11 operating them. There's business being transacted and Kevin's
12 out. And finally we would submit on a motion --

13 THE COURT: Well, he may have a claim under the -- or
14 the estate may have a claim under the governing agreements
15 which you haven't set forth.

16 MR. BODNER: We would propose -- we would attach a
17 proposed second amended complaint with a motion to seeking
18 leave. We would be --

19 THE COURT: Well, you've made the -- you've asked for
20 leave. I have another way to deal with it. I'll give you the
21 last word.

22 MR. BODNER: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MS. PEÑA: Your Honor, just to clarify the record.

25 It wasn't our intention to use the dismissal of the counts as

1 a sword.

2 THE COURT: It doesn't matter. It doesn't affect my
3 decision at all.

4 MS. PEÑA: And we just wanted to hit home on the
5 issue with respect to the derivative nature of these claims.
6 Your Honor's correct. They've alleged that they're insolvent.
7 Mr. Bodner had raised the issue that maybe solvency is influx
8 because of the Plain's Bank settlement but we want to point
9 out that Plain's Bank was a secured creditor of these three
10 Vulcan entities. So if there's any recovery for these three
11 entities you shouldn't be jumping over the secured creditors.

12 THE COURT: Thank you. Look, I'm going to grant the
13 motion. All the claims that you have alleged are non direct.
14 They're derivative claims to the extent you've alleged claims.
15 They all involve transfers either of entities in which Davis
16 has 50 percent interest or effective corporate opportunity of
17 entities in which Davis has a 50 percent interest or in
18 entities that drop down in the familial structure that they
19 used. These are derivative claims. The injury is to the
20 corporation or the LLC or whose property was transferred or
21 whose opportunity was usurped. All creditors suffer alike.
22 All shareholders suffer alike and by definition those are
23 derivative claims. I agree that the estate lacks standing to
24 assert those claims as direct claims.

25 Now, with respect to derivative claims, I suppose

1 that you could solve the procedural problem. I have a serious
2 question about whether or not I have jurisdiction over a claim
3 by the Trustee, by Mr. Babitt as representative of the estate
4 of Vulcan Capital LLC for example against Graham brought for
5 the benefit of Vulcan Capital LLC.

6 If I had jurisdiction over that claim I'm not sure I
7 wouldn't grant an abstention motion. It's got really -- it's
8 far removed from this bankruptcy particularly given the
9 allegation that all these entities were insolvent. It seems
10 to me on the surface the way it's pleaded that Davis has no
11 interest in this case.

12 Now, with respect to the failure to state a claim,
13 there are a lot of conclusory allegations in the complaint.
14 The specific allegations in the complaint relate to the
15 specific transfers by Vulcan Elditon which are set forth in
16 25, Paragraphs 25 to 39 although there's no allegation that
17 those transfers are wrongful in any sense.

18 Just sit down.

19 There are the allegations regarding the usurpation
20 of the corporate opportunities belonging to IF&DC-Vulcan
21 Energy Group at Paragraphs 40 to 45. You've amplified that a
22 little bit but there's no really no information about what the
23 corporate opportunity is. You have allegations -- I mention
24 regarding the adjoining lot, the borrowing the money and only
25 repaying half of it is a breach of contract claim. As I said,

1 there are allegations in there that although somewhat
2 indefinite and conclusory that Graham or the Family Trust or
3 one of his affiliates used property -- one of these Vulcan
4 entities to pay the expenses on property that he or his
5 affiliated owned and it sounds to me like that could be a
6 direct claim not belonging to Davis but that one strikes me as
7 being sufficiently - well, it's not sufficiently pled because
8 it's conclusory but there is a germ of a claim there.

9 The general allegation that Ford Graham and/or
10 Katherine Graham and/or Todd Graham unlawfully diverted assets
11 of the Vulcan family in breach of the governing agreements is
12 just too conclusory as is -- I'm not quite sure I understand
13 this but this allegation that Todd Graham transferred -- Todd
14 Graham and/or Ford Graham transferred a \$4 million debt of
15 Todd Graham to Vulcan Capital. That's supposed to mean that
16 Vulcan Capital assumed that debt?

17 MR. BODNER: Yes, Your Honor.

18 THE COURT: Well, again, that certainly may be a
19 fraudulent obligation that could be asserted by Vulcan Capital
20 but it's not a direct claim of Mr. Davis.

21 Let me go through some of these other matters. Now,
22 with respect to the fraud Counts 22 and 23, they are legally
23 insufficient. You say that misrepresentations were made. You
24 don't identify the misrepresentations. You don't identify any
25 reliance. In fact, I don't even know if you're saying Davis

1 relied on these or some third parties relied on them and Davis
2 can't assert the fraud practice against other parties. You've
3 also got no allegations in the complaint relating to Vulcan
4 Management. I think they're encompassed in Count 3. There's
5 no basis to support that count.

6 Count 24 is the unjust enrichment claim. It does
7 appear that there are governing agreements. It's impossible
8 to tell whether these unjust enrichment claims relate to those
9 governing agreements or to something else. It's just too
10 indefinite.

11 So what I will do is I will give you leave to
12 replead but you send the draft complaint to the defendant. If
13 you think it's not asserted in good faith within the meaning
14 of Rule 9011 you send them a safe harbor letter. If we go
15 through this again and you're just repeating these mistakes, I
16 will entertain a motion for sanctions against counsel because
17 I think the defendants have spent a lot of time making these
18 motions. The debtor reviewed the first one because apparently
19 it was mooted by the filing of an amended complaint -- some
20 claims but this is an amended complaint which certainly,
21 certainly should not have been filed in the form in which it
22 was filed.

23 Now, the one thing I don't understand is the
24 parties reached a settlement and I did not approve it
25 presumably because there wasn't enough information about the

1 claims that were being settled.

2 MR. BODNER: Your Honor simply asked us for a
3 supplemental affidavit. Just to --

4 THE COURT: Because I didn't know what the claims
5 were that you were settling.

6 MR. BODNER: -- describe the nature of the claims a
7 little bit clearer.

8 THE COURT: So what happened?

9 MR. BODNER: We drafted an entire new 9019 motion
10 amplifying it. We were about to file it. However, the
11 settlement included a check to be held in escrow and Mr.
12 Graham never gave that check --

13 THE COURT: I remember that now. It's a settlement
14 off the -- that was like a \$250,000.00 check or something. Is
15 that settlement still possible? You're going to spend more
16 money than that litigating this case.

17 MR. BODNER: We've offered -- we've discussed it with
18 the Trustee and in light of certain solvency issues as well
19 as --

20 THE COURT: I've read your complaint. Believe me, I
21 know enough about this case now to --

22 MR. BODNER: We'd like to settle it even for less.

23 THE COURT: Well, don't bet against yourself, Mr.
24 Bodner. Look, I think this is a case that should be settled.
25 For the amount of money you're talking about I don't believe

1 you should pay tribute but as a practical matter you're going
2 to pay more money to defend this even on another motion to
3 dismiss and then it's going to be -- so I will grant you --
4 you can submit an order granting the motion for the reasons
5 stated on the record. You don't have to recount those
6 reasons. Anybody can buy the transcript. With leave to
7 replead within 30 days and then leave a space blank and I'll
8 fill in a date for the pretrial conference.

9 MR. BODNER: And for the pretrial conference there's
10 a couple of defendants that put in an answer, Ford Graham's
11 wife as well as some other parties. I guess at that pretrial
12 conference --

13 THE COURT: Why don't we just adjourn that -- unless
14 there's an objection to it we'll just adjourn the pretrial
15 conferences to the date I fix in the order. When are the
16 pretrial conference -- when is the pretrial conference in this
17 matter?

18 MR. BODNER: I think it was today.

19 THE COURT: All right. I will -- let me see. I take
20 it back. I had it. I'll adjourn it on the record sine die
21 and when I fix the date just include in the order the date
22 that the pre -- the entire pretrial conference will be on
23 whatever date I fill in which will be some date after the
24 pleadings will be closed and following the filing of the
25 second amended complaint if it comes to that.

1 MR. BODNER: Thank you, Your Honor.

2 MS. PEÑA: Thank you, Your Honor.

3 THE COURT: Thank you.

4 (Proceedings concluded at 11:54 a.m .)

5 * * * * *

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

4
5 _____
6 Shari Riemer

7 Dated: December 6, 2013
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25